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No. 08-1309

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IN THE

Supreme Court of the United States

HILL DERMACEUTICALS, INC.,

Petitioner,

v.

RX SOLUTIONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether review is warranted when there is no current split among the circuits concerning the right of each defendant in a multi-defendant case to remove a case to federal court within thirty days of receiving the complaint and summons.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

United HealthCare of Florida, Inc. is a wholly-owned subsidiary of non-party United Healthcare, Inc., which is a wholly-owned subsidiary of non-party United HealthCare Services, Inc. United HealthCare Services, Inc., is a wholly-owned subsidiary of United HealthGroup, Inc., which is a publicly-traded company.

Prescription Solutions, Inc., is a wholly-owned subsidiary of PacifiCare Health Systems, LLC, which is a wholly-owned subsidiary of United HealthGroup, Inc.

As stated above, United HealthGroup, Inc. is a publicly-traded company. No publicly-traded company owns more than ten percent of United HealthGroup, Inc.

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PRELIMINARY STATEMENT

Petitioner, Hill Dermaceuticals, Inc. ("Hill") seeks certiorari jurisdiction to challenge the right of United Health Group, Inc. ("UHG"), a defendant in this action whom Hill added in its Amended Complaint many months after commencing litigation, to remove the case to federal court. It is undisputed that UHG complied with 28 U.S.C. § 1446(b) in removing this matter – UHG's removal was timely and technically proper. Rather, Hill argues that UHG had no right to remove the case at all because Hill had served other defendants with process long before amending its complaint to add UHG.

Hill contends that removal must occur within thirty days after the "*first-served*" defendant receives the complaint and summons. Where, as here, a defendant is added as a party later, according to Hill, it has no independent removal right. Hill posits that this is particularly true if, as in this case, the "*first-served*" defendants removed the case once prior and were remanded by the district court. The courts below disagreed with Hill. They applied a "*later-served*" defendant rule, which permits each defendant an independent right to remove a case pursuant to § 1446(b), regardless of the actions of earlier-served defendants.

Hill now asks this Court to grant its Petition for Certiorari. Hill contends that there is a compelling need for it to resolve a (purported) dispute among the circuits concerning whether the "*first-served*" or "*later-served*" defendant rule should apply. Pet. at 13. Hill is wrong.

There is no dispute about the applicable rule. Since 1999, the Sixth, Eighth, and Eleventh Circuits have all applied the "*last-served*" defendant rule. These courts of appeals have reasoned that application of the "first-served" defendant rule could cause a defendant's procedural rights to "slip away" before it even becomes a party to a case through service of a complaint and summons, a result that this Court explicitly warned against in *Murphy Bros., Inc. v Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 356 (1999). Hill has not cited any circuit court case since 1999 (and there is none) that has applied the "*first-served*" defendant rule. Consequently, there is no current dispute among the circuits as to which rule to apply, and no compelling reason for the Court to accept Hill's petition.

Hill separately argues that it was improper for the district court below to deny remand of UHG's removal petition because UHG predicated removal on the same arguments as earlier-added defendants, which the district court remanded. According to Hill, the district court "reconsidered" its earlier remand, which is allegedly improper pursuant to 28 U.S.C. § 1447(d). Hill is again mistaken. The district court remanded the first removal attempt in this case due to the earlier-added defendants' failure to oppose Hill's remand petition timely, not for lack of federal court jurisdiction or due to procedural defects. Indeed, it would have been improper under *Murphy Bros.* for the courts below to have prevented UHG from removing this case based on the other defendants' conduct.

In any event, Hill's arguments in this regard do not raise any conflict among the circuits or any other compelling need for this Court to grant Hill certiorari jurisdiction.

STATEMENT OF THE CASE

1. Hill originally filed suit in Florida state court. The defendants in the initial lawsuit included Rx Solutions, Inc. ("Rx Solutions"), United Healthcare of Florida, Inc. ("UHF"), and two non-existent entities. Rx Solutions and UHF timely removed the case to the United States District Court for the Middle District of Florida in December 2007.

2. After removal, Rx Solutions and UHF filed a motion to dismiss the complaint, which the district court granted. But, the district court permitted Hill twenty days to file an amended complaint. On January 29, 2008, days before the court granted defendants' motion to dismiss, Hill moved to remand the case back to Florida state court ("January 29 Remand Motion"). Believing that the district court's dismissal order mooted all pending motions, Rx Solutions and UHF did not oppose remand. Instead, defendants discussed with opposing counsel a briefing schedule regarding Hill's remand arguments in the event that Hill filed an amended complaint.

3. On February 20, 2008, Hill filed its First Amended Complaint ("Amended Complaint"). Five days later, while the parties continued to negotiate the briefing schedule referenced above, the district court remanded the case because Rx Solutions and UHF failed to oppose Hill's January 29 Remand Motion timely.

4. In its Amended Complaint, Hill added UHG as a defendant for the first time. Only days after receiving the Amended Complaint, UHG removed the case against it. Rx Solutions and UHF timely consented to UHG's notice of removal.

5. Hill again moved to remand the case to Florida state court. All defendants timely opposed remand, and the district court denied Hill's remand motion.

6. UHG, UHF, and Rx Solutions also moved to dismiss Hill's Amended Complaint, which was virtually identical to the original complaint. While defendants' second motion to dismiss remained pending, and more than three months after filing the Amended Complaint, Hill sought leave to file yet a third version of its complaint. This time, Hill proffered a declaration by Dr. Coverman, a physician that purportedly prescribed Hill's product. Other than Dr. Covernman's declaration and a new request for injunctive relief, Hill's proposed second amended complaint mirrored previous iterations of its pleading.

7. On June 5, 2008, the district court dismissed Hill's Amended Complaint with prejudice. Even accounting for the proposed declaration of Dr. Coverman, the district court found that Hill's grievance was not actionable.

8. Hill appealed the district court's decision. But, on December 17, 2008, the Eleventh Circuit affirmed the district's courts decisions. Hill petitioned for rehearing, which the Eleventh Circuit denied on January 21, 2009.

9. Hill filed its Petition for Certiorari on April 24, 2009.

REASONS FOR DENYING THE PETITION

This Court will grant certiorari only if a petitioner demonstrates a "compelling" reason. *See, e.g.*, Sup. Ct. R. 10. Hill contends that there is a compelling reason for Court intervention here because (allegedly) the circuit courts of appeals disagree about how to apply § 1446(b) for cases involving multiple defendants. According to Hill, some courts apply a "*first-served*" defendant rule. Under this purported rule, removal must happen within thirty days after the first defendant receives a copy of the complaint and summons. Any defendant added to the case after this initial thirty-day window has absolutely no ability to remove the case. In contrast, other courts – including the district court and the court of appeals here – apply a "*last-served*" defendant rule, which recognizes that each defendant has an independent right to remove a matter to federal court pursuant to § 1446(b), predicated on when that defendant was served with the complaint and a summons. Pet. at 13. Hill contends that the Eleventh Circuit and the district court erred in applying the "*last-served*" defendant rule.

Hill is wrong. There is no dispute among circuit courts of appeals about the proper interpretation of § 1446(b). Since at least since 1999, when this Court decided *Murphy Bros.*, the courts of appeals have unanimously held that each defendant has the right to remove a case to federal court within thirty days of receiving the complaint and summons, independent from the rights of any other defendant(s). Consequently, there is no compelling reason for this Court to grant certiorari review. The Court should deny Hill's Petition for Certiorari.

I. Since the Court's Decision In *Murphy Bros.*, There Has Been No Conflict Among the Circuit Courts of Appeals Regarding Proper Application of § 1446(b).

Hill contends that UHG should not have been allowed to remove this case because it did so more than thirty days after the "*first-served*" defendants – *i.e.*, Rx Solutions and UHF – received a copy of the summons and complaint. Relying on decades-old law from the Fifth Circuit, Hill contends that the district court should have remanded this case back to Florida state court. The district court and the court of appeals disagreed.

Hill's petition for certiorari lacks merit because, for the past decade, there has been no serious dispute – and certainly not a compelling one – among the circuit courts of appeals about how to apply § 1446(b). In that period, the three courts of appeals that have considered the issue – the Sixth, Eighth, and Eleventh Circuit Courts of Appeals – uniformly have held that the text of § 1446(b) favors application of the "*later-served*" defendant rule, which the lower courts applied in this case. *Bailey v. Janssen Pharmaceutica*, 536 F.3d 1202, 1208-09 (11th Cir. 2008) ("The tide of recent decisions by the courts of appeals . . . recognize that equity favors permitting each defendant thirty days in which to seek removal under the statute."); *Marano Enter. v. Z-Teca Rest., L.P.*, 254 F.3d 753, 756 (8th Cir. 2001) (defendant has thirty days to remove regardless of when or if previously-served defendants filed such notices); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999) (as a matter of fairness to later-served defendants, each defendant has thirty days from the date of service to remove a case to federal district court).

The currently recognized "*last-served*" defendant rule is grounded in equity and fairness, and requires no review by this Court. *Bailey*, 536 F.3d at 1208. In *Murphy Bros.*, this Court held that a defendant must receive both a copy of the complaint and a copy of the summons to trigger the thirty-day removal window. 526 U.S. 347. The Court reasoned that the summons is necessary to bring the defendant within the jurisdiction of the court. *Murphy Bros.*, 526 U.S. at 350 (". . . summons is the *sine qua non* directing an individual to participate in a civil action or forgo procedural or substantive rights."). The Court refused to allow removal to be the lone situation in which "one's procedural rights slip away before service of a summons." *Id.* at 356.

Hill does not proffer any post-*Murphy Bros.* authority to support what it describes as a "complex and contradictory" dispute among the circuit courts of appeals regarding this issue. Indeed, there is none. Hill cites to only a single court of appeals that has applied the "*first-served*" rule, and its most recent decision on this issue is more than two decades old. *See Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988); *Brown v. Demco, Inc., et al.*, 792 F.2d 478 (5th Cir. 1986). These pre-*Murphy Bros.* decisions hardly present the sort of compelling dilemma that warrants this Court's consideration on certiorari review.

II. The District Court Was Not Compelled to Remand The Case A Second Time.

Hill separately seeks certiorari review because the court of appeals permitted the district court to "reconsider" its prior remand. Pet. at 18. According to Hill, once remand occurred, pursuant to 28 U.S.C. § 1447(d), no court had the authority to reconsider that decision. But, Hill did not demonstrate that there is any circuit conflict about application of § 1447(d). Rather, Hill contends that the court of appeals reached the wrong decision. Pet. at 18. Regardless, Hill has not demonstrated a "compelling need" for certiorari jurisdiction concerning this issue.

In any event, the court of appeals did not err. Section 1447(d) bars reconsideration of remand orders predicated on lack of jurisdiction or defects in the removal procedure. Pet. at Exhibit 1, p. 6. The district court's remand of Rx Solutions' and UHF's notice of removal – *i.e.*, the initial removal – was not predicated on lack of jurisdiction or defects in the removal procedure. *Id.* Therefore, there was no improper reconsideration of the remand in this case.

Moreover, Hill's suggested application of § 1447(d) is also wrong because it is inconsistent with *Murphy Bros.* According to Hill, by failing to oppose remand timely, Rx Solutions and UHF (the *first-served* defendants) forever extinguished the first and only right of UHG, a later-served defendant, to remove the case against it. But, *Murphy Bros.* plainly holds that a defendant cannot lose a fundamental procedural right (such as its right to remove a case to federal court) before

it has received a summons. *Murphy Bros.*, 526 U.S. at 356. If Hill wished to avoid the specter of federal court jurisdiction, Hill could have chosen not to add UHG as a party in its Amended Complaint. Once Hill included UHG in this case (months after it began), Hill accepted the possibility (under *Murphy Bros.*) that UHG would exercise its independent right to remove this case to federal court.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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